84-1441

No.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

ROGER J. KAY, D.O.,

Appellant,

v.

THE COMMONWEALTH OF PENNSYLVANIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

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72 pp

QUESTIONS PRESENTED

1. Whether Rule 319, Pennsylvania Rules of Criminal Procedure, as interpreted by the Pennsylvania courts, violates the Sixth Amendment to the United States Constitution, made obligatory upon the states via the Fourteenth Amendment, by permitting a trial judge before whom a defendant contemplates pleading guilty to a criminal charge to delegate the entirety of his colloquy and notification responsibilities to a prosecutor, and thereby maintain judicial silence throughout the duration of a plea tender hearing, as in the case *sub judice* ?

2. Whether Rule 320, Pennsylvania Rules of Criminal Procedure, as interpreted by the Pennsylvania courts, violates the First, Fifth and/or Sixth Amendments to the United States Constitution, made obligatory upon the states via the

Fourteenth Amendment, by affording to a trial judge unfettered discretion to deny a defendant's *presentence* motion to withdraw a guilty plea to a criminal charge, where the defendant has testified under oath that he tendered the plea unintelligently and involuntarily, notwithstanding the defendant's failure to assert his innocence, as in the case *sub judice* ?

3. Whether Rule 321, Pennsylvania Rules of Criminal Procedure, as interpreted by the Pennsylvania courts, violates the Due Process Clause, and/or the Equal Protection Clause, of the Fourteenth Amendment to the United States Constitution, by vesting in a trial judge unfettered discretion of deciding whether to sit alone or to convene a court *en banc* to hear a challenge to a guilty plea, as in the case *sub judice* ?

4. Whether the Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa.C.S. §§ 5704 *et seq.*, as interpreted by the Pennsylvania courts violates the First, Fourth, Fifth and/or Sixth Amendments to the United States Constitution, made obligatory upon the states via the Fourteenth Amendment; and/or whether the same state statute is in conflict with the Wire Interception and Interception of Oral Communications provisions of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510, *et seq.*, as amended, in that the Pennsylvania statute in question permits "any investigative or law enforcement officer or any person ... to intercept a wire or oral communication involving suspected criminal activities [without a warrant or judicial or executive authorization] where ... (i) such officer or

person is a party to the communication", particularly where the interception was occasioned by Federal law officers, as in the case *sub judice* ?

5. Whether, on the "totality of the circumstances", Appellant's recanted guilty plea violates his rights under the First, Fourth, Fifth, and/or Sixth Amendments to the United States Constitution, made obligatory upon the states via the Fourteenth Amendment, in that the Appellant's guilty plea tender was made unknowingly, unintelligently, and/or involuntarily, and/or in that it was unsupported by record adequacy?

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No.

ROGER J. KAY, D.O.,

Appellant,

v.

THE COMMONWEALTH OF PENNSYLVANIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

Appellant Roger J. Kay, D.O. appeals from the judgment and sentence of the Supreme Court of Pennsylvania entered on November 20, 1984, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The judgment of the Supreme Court of Pennsylvania, without opinion, is reported in ___ Pa. ___, ___ A.2d ___ (1984). The judgment and opinion of the Superior Court of Pennsylvania are reported in __Pa.Super. ___, 478 A.2d 1366 (1984). The decisions of both courts appear in Appendix B hereto, *infra*, p. 1b.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on November 20, 1984. *Commonwealth v. Kay*, ___ Pa. ___, ___ A.2d ___ (1984); Appendix B, *infra*, p. 1b. Appellate jurisdiction of the Supreme Court of the United States is conferred by 28 U.S.C. Section 1257(2), because Appellant drew into question the validity of certain Pennsylvania statutes on the ground that they are repugnant to the Constitution or laws of the United States, and the state

court decision is in favor of their validity.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

At issue is whether 18 Pa.C.S. Section 5704, or Rule 319, Rule 320, or Rule 321, Pennsylvania Rules of Criminal Procedure, violate the First, Fourth, Fifth, Sixth or Fourteenth Amendments to the United States Constitution. For text, see Appendix A and Appendix D, *infra*.

STATEMENT OF THE CASE

On October 9, 1981, Wayne F. Manis and other special agents of the Federal Bureau of Investigation, working undercover, met with Appellant, Dr. Roger J. Kay, at the Holiday Inn in Erie, Pennsylvania to talk about x-ray film that had been stolen and shipped in interstate commerce in violation of Federal laws. Appellant had become the focus of this criminal investigation since Federal agents were seeking incriminating

admissions from him. Conversations that day and all subsequent conversations between Appellant and the F.B.I. agents came to be recorded without Appellant's knowledge or consent, without a warrant, and without the administrative authorizations required under Federal law where Federal undercover officers are engaged in eavesdropping or wiretapping.

After offering repeatedly to "help" the Appellant to solve some of his "business" problems, the agents agreed to murder a Dr. Daniel Carneval, another physician and the Appellant's hospital supervisor, and they quoted Appellant the price of $10,000. for this service. Agent Manis, posing as some west-coast mobster named Tony Magliano, on October 9th told Appellant about his plans: "My intentions are to hit the doctor with some Rompun", a veterinary tranquilizer, to knock-out the victim without causing death

so that "if I get stopped before I get him to where I want him I'm not transporting a corpse. ... Once I get him to where I want him I'll hit him with some Succinylcholine" to stop his breathing. Appellant agreed to procure the drugs for Manis and on October 21, 1981, paid Manis $2,000. in cash for "travel expenses" related to the murder.

In between October 9th and October 21st Manis telephoned Appellant long-distance from California, still pretending to be Magliano, and kept inquiring how the murder plans were progressing. Manis encouraged Appellant to call another undercover agent named Joseph Mahoney, posing as Joe Numba, supposedly another mobster, whom Appellant did telephone on October 28, 1981. After Appellant called "Numba", Manis "Magliano" telephoned Appellant long-distance, this time from Colorado, so that by October 29, 1981, the F.B.I. was convinced Appellant

was serious about paying for Dr. Carneval's murder, and decided to end the charade.

On October 30, 1981, the F.B.I. arrested Appellant and confronted him with the tape recordings they had accumulated from his conversations with the undercover officers. So confronted, Appellant allegedly made a "confession" to the F.B.I., following which Appellant was indicted by a Federal grand jury on charges not germain to this appeal, and Pennsylvania state authorities began to prosecute Appellant for Solicitation to Commit Murder and Conspiracy to do Murder.

Appellant first objected to the wiretap and eavesdrop evidence and to Appellant's alleged "confession" at the Probable Cause Hearing held on December 14, 1981, at Erie, Pennsylvania, before District Justice John A. Vendetti. On May 3, 1982, Appellant on advice of his counsel at the time tendered a plea of guilty to the Solicitation charge

and was convicted of violating Pa.C.S.903. Appellant's counsel had advised him that none of the evidence gathered against him by the F.B.I. could be suppressed. During subsequent conversations with new counsel, including the undersigned, suppression was re-evaluated and Appellant moved the trial court *before* sentencing for permission to withdraw his guilty plea and exercise his constitutional right to a trial. Appellant contended in support of his Plea Withdrawal Motion that he had tendered the Guilty Plea involuntarily and unintelligently and that it was unsupported by a factual basis. He argued that the trial judge's silence all through the Plea Tender Hearing, where the prosecutor alone conducted a colloquy, was insufficient as a matter of law to afford him due process of law.

The trial court denied Appellant's Plea Withdrawal Motion on March 21, 1983, then

immediately on the same date proceeded to sentence Appellant to serve a prison term of between four and ten years, plus to pay a $5,000. fine and costs of prosecution.

The trial court ordered the sentence to run consecutively to the term Appellant at the time was serving in a Federal prison on Interstate Transportation of Stolen Property charges to which Appellant pleaded guilty as a result of the same undercover Federal criminal investigation.

On March 30, 1983, Appellant tendered a timely and proper Post-Sentence Motion for Guilty Plea Withdrawal but the trial court denied this motion on March 31, 1983. The Appellant tendered his timely and proper Notice of Appeal to the Superior Court of Pennsylvania on April 7, 1983. On July 20, 1984, the Superior Court of Pennsylvania affirmed Appellant's conviction and found expressly that the Pennsylvania Wiretapping

and Electronic Surveillance Control Act, 18 Pa.C.S. Section 5704, permits any law enforcement officer to secretively record conversations to which he is a party during a criminal investigation. For this reason, the Superior Court stated, Appellant could not have suppressed the evidence obtained during the undercover investigation; thus his trial counsel properly advised him to plead guilty and the trial court properly refused to permit Appellant to withdraw his guilty plea.

On August 17, 1984, Appellant filed his Petition for Allowance of Appeal before the Supreme Court of Pennsylvania, but the Supreme Court of Pennsylvania denied this Petition on November 20, 1984. On February 14, 1985, Appellant tendered a timely and proper Notice of Appeal to this Court.

Throughout the procedural history of the case, constitutional challenges to the

investigative and pleading procedures were incorporated fairly within the appellate arguments and denied by the state courts.

In the Brief for Appellant before the Superior Court of Pennsylvania, Appellant challenged the plea tender procedures, the absence of "record adequacy", and the lack of a sufficient colloquy as violating this Court's mandates in *Boykin v. Alabama*, 395 U.S. 238 (1969); *Brady v. United States*, 397 U.S. 742 (1970); and *McCarthy v. United States*, 394 U.S. 459 (1969). Moreover, the Appellant also challenged in the same brief the unconstitutionality of the warrantless and unconsensual surveillance and recording conversations between Appellant and undercover law enforcement officers as violating this Court's mandates in *Katz v. United States*, 389 U.S. 347 (1967) as well as the spirit and formalities of Federal eavesdropping laws. The Superior Court of Pennsylvania

disallowed Appellant's challenges by reasoning that, as to the surveillance, the law of Pennsylvania permits a law enforcement officer to record any conversation where he is a party to the same; *Katz v. United States*, __ Pa.Super. ____, 478 A2d 1336,1399 (1984) citing the Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa. C.S. §§5704(2)(i); and that, as to the plea tender challenges, the Pennsylvania Rules of Criminal Procedure control despite the challenges under Federal law, because of Pennsylvania statutory law:

> Pa.R.Crim.P. 319 outlines a procedure to be followed that will assure the guilty plea is voluntarily tendered. *No more than the inquiries outlined in Pa.R.Crim.P. 319 is required. Commonwealth v. Kay, supra,* at ___' 478 A.2d 1366,1368. (Emphasis added).

Therefore, while the Superior Court of

Pennsylvania stopped short of an express ruling upholding the constitutionality of the Pennsylvania Rules of Criminal Procedure, it reached this result, *sub silencio*, a result the Supreme Court of Pennsylvania refused to review. (See the unreported order of the Supreme Court of Pennsylvania, *infra*, Appendix B at p. 11b).

THE QUESTIONS ARE SUBSTANTIAL

Appellant is an "aggrieved" person who was a party to unlawful electronic police surveillance (see definition of aggrieved person under Pennsylvania law, *infra*, within Appendix A at p. 2a). Therefore, the Appellant is entitled to have the courts decide the merits of his disputed issues and, consequently, Appellant has standing under Federal law. *Warth v. Seldin*, 422 U.S. 490,498 (1975). Appellant has suffered actual injury, *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979) because his plea

of guilty and conviction have caused him to be incarcerated for the past two years. This injury can fairly be traced to court and police actions complained of, without which Appellant would either not have been arrested or could have suppressed results of police misconduct prior to or at trial. Vacation of Appellant's guilty plea would afford him his right to trial and right to suppress evidence unlawfully obtained, so that the wrong done to Appellant is likely to be redressed by a favorable decision in this Court. *Valley Forge, etc. v. Americans United, etc.*, 454 U.S. 464,465 (1982). In short, Appellant is an "aggrieved person" entitled to seek suppression of evidence against him under *Alderman v. United States*, 394 U.S. 165,171 (1969).

In considering Appellant's contentions, this Court should recall its own warning that "[few] threats to liberty exist which

are greater than that posed by the use of eavesdropping devices." *Berger v. New York*, 388 U.S. 41, 63 (1967). Wherever a person may be, "he is entitled to know that he will remain free from unreasonable searches and seizures. *Katz v. United States*, 389 U.S. 347,359 (1967). This case involves much more than police surveillance in the hotel room or on the telephone where the Appellant made incriminating statements. This case goes to the heart of fair and just judicial practices within the court room, for, if an aggrieved person cannot redress through the courts whatever harm has befallen him at the hands of police, than whatever civil rights Appellant may have on paper cannot be brought to life to give him protection when he needs help.

After being paid $50,000., Appellant's trial counsel proceeded cursorily to tell Appellant to plead guilty to an infamous

crime by simply stating, *ex cathedra*, that Appellant could not suppress the fruits of a warrantless and unconsensual electronic police surveillance because a Pennsylvania statute allows the same. Trial counsel even cited this Court's ruling in *United States v. White*, 401 U.S. 745 (1971), with a preposterous misinterpretation:

> [T]here was a Supreme Court decision in 1971, U.S. versus White, it simply says that nonconsentual recordings by undercover agents of conversations with a participant in an ongoing offense does not violate any Fourth Amendment right. T.R. at 124-125.

White says no such thing. In fact, *White* is ambiguous for what it does not say and for the fact that it was a plurality, not a majority, decision. The instant case could afford this Court an opportunity to clarify certain aspects of *White*, so that

lawyers cease to misadvise their clients.

Even more shocking than Appellant's trial counsel's advice was the treatment of Appellant's calamity by Pennsylvania courts which ignored at every level the argument by Appellant's appellate counsel that Pennsylvania statutory procedures in use by both police and the courts violate Federal laws which, under the doctrine of pre-emption, must take precedence. The Superior Court of Pennsylvania appeared thoroughly oblivious to this Court's decisions in cases such as *Boykin v. Alabama*, 395 U.S. 238 (1969) and *McCarthy v. United States*, 394 U.S. 459 (1969), when its panel wrote in Appellant's case:

> The appellant contends the record is inadequate because the prosecutor and not the trial judge questioned the appellant. Both Pa.R.Crim.P.319 and the case law clearly state that

> the examination of the pleading party need not be performed by the court alone. Either counsel may conduct part or all of the examination. *Commonwealth v. Kay*, ___ Pa.Super. ___, 478 A.2d 1366,1368 (1984).

Thus, not only does this case reflect a defendant whose Constitutional or other rights may have been violated by police, but it reflects a defendant whose rights to challenge police violations in a court of law were infringed by the trial judge and trial counsel. Repeatedly, this Court has deemed more substantial violations of rights that occur inside compared with outside the courtroom. See *Stone v. Powell*, 428 U.S. 465 (1976); *Blackledge v. Perry*, 417 U.S. 21 (1974).

A. THE WIRETAPPING AND ELECTRONIC SURVEILLANCE CONTROL ACT OF PENNSYLVANIA IS UNCONSTITUTIONAL.

It is well-established that Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20, and the Fourth Amendment to the United States Constitution "establish the outer limits of any intrusion into the protected privacy area." See *United States v. Geller*, 560 F.Supp. 1309,1312 (E.D.Pa. 1983). The state statute that permits greater police intrusion must give way to Federal law or be invalidated as repugnant to the Fourth Amendment. Yet, state statutes that are more protective of privacy must be given effect even in Federal courts. *Id.*

The Pennsylvania Wiretapping and Electronic Surveillance Control Act makes it a crime for the ordinary citizen to "intercept" a wire or an oral communication even if he is a party to the same, without permission from the Superior Court. 18 Pa. C.S. § 5703. Yet, the same act contains a

provision excepting police from statutory regulation during investigations of some criminal offenses:

> It shall not be unlawful under this chapter for:
>
> ...
>
> (2) Any investigative or law enforcement officer or any person acting at the direction or request of an investigative or law enforcement officer to intercept a wire or oral communication involving suspected criminal activities where:
>
> (i) such officer or person is a party to the communication. 18 Pa.C.S. § 5704.

Thus, 18 Pa.C.S. § 5704 permits law enforcement officers to record conversations in which they are involved, but also 18 Pa.C.S. § 5703 deprives others of this same opportunity. As the United States

District Court for the Eastern District of Pennsylvania remarked in a case before it involving similar facts:

> Worse, ordinary citizens who record their conversations without the knowledge of the person with whom they are speaking commit a criminal offense. ...Hence, ... Pennsylvania law enforcement officers can selectively record incriminating conversations and thereby entrap unwary citizens. Citizens, however, possess no correlative right to record their exculpatory conversations. *United States v. Geller, supra,* at 1313.

Hence, Pennsylvania law enforcement officers can selectively record incriminating conversations and thereby entrap unwary citizens. Citizens, however, possess no correlative right to record their exculpatory conversations.

Hence, this Pennsylvania statute puts citizens and potential defendants at an unconstitutional disadvantage because it forces them either to commit a crime by recording conversations, or submit to possible entrapment. *Id.* The Pennsylvania law, therefore, creates a constitutional imbalance by granting to state officers or Federal officers specified rights but denying similar rights to ordinary people. See *Washington v. Texas*, 388 U.S. 14,23 (1967).

"[T]he protection of privacy was an overriding Congressional concern" in enacting Title III. *Gelbard v. United States*, 408 U.S. 41,48 (1972). Indeed, Congress seems to have intended therein to create "a comprehensive scheme for the regulation of wiretapping and electronic surveillance." *Id.* at 46. As the United States District Court for the Northern District of Illinois, Eastern Division, noted masterfully

in *United States v. Torres*, 583 F.Supp. 86, 89 (1984):

> This Congressional solicitude for safeguarding of privacy was clearly expressed in the Senate Committee Report on Title III. It was there said that "Title III has as its dual purpose (1) protecting the privacy of wire and oral communications, and (2) *delineating on a uniform basis* the conditions under which the interception of wire and oral communications may be authorized." S.Rep.No. 1097, 90th Cong.2d Sess. 66 (1968). (Emphasis added).

If Congress did envision such uniformity in the authorization of wire and oral communications, it seems hardly likely it intended state laws to contravene spirit and form of Title III. It seems even less likely Congress intended a statute such as

Pennsylvania's Act to unreasonably broaden the warrantless surveillance powers of *Federal* law enforcement officers, the end product of the instant case.

Moreover, the Pennsylvania statute in question is replete with vague definitions, and without explanation makes distinction between "organized" and other crimes, relaxing Constitutional safeguards where law officers contend they are investigating the former.

B. THE PENNSYLVANIA RULES OF CRIMINAL PROCEDURE, RULES 319, 320 AND 321, ARE UNCONSTITUTIONAL.

The principle known as "record adequacy" compels that the transcribed record of a guilty plea to a criminal charge show the defendant tendered his plea (1) knowingly, (2) intelligently and (3) voluntarily, and that (4) there exists a "factual basis" for that plea. *Boykin v. Alabama*, 395 U.S. 238

(1969). As this Court warned: There is no adequate substitute for demonstrating *in the record at the time the plea is entered* the defendant's understanding of the nature of the charges against him. *McCarthy v. United States*, 394 U.S. 459,470 (1969). (Emphasis in the original).

This Court has explained the reason and purpose of "record adequacy":

> Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered. ... First, is the privilege against compulsory self-incrimination. ... Second, is the right to trial by jury ... . Third, is the right to confront one's accusers. ... We cannot presume a waiver of these three important federal rights from a silent record.

Boykin v. Alabama, supra, at 243.

Thus, that "record adequacy" is a Federal

Constitutional right has been established clearly by this Court.

Moreover, this Court has warned trial judges against presuming anything from a "silent record", because the goal of determining a pleading defendant's voluntariness is:

> undermined in proportion to the degree the [trial] judge resorts to "assumptions" not based upon recorded responses to his inquiries.

McCarthy v. United States, *supra*, at 467. This Court has urged even more:

> [The trial court's] *personally* addressing the defendant as to his understanding of the essential elements of the charge to which he pleads guilty would seem a necessary prerequesite to a determination that he understands the meaning of the charge. *Id.* at 467-468, n.20. (Emphasis added).

It seems rather obvious, therefore, that the spirit, if not the letter, of *McCarthy* mandates that a judge not delegate these notification and colloquy responsibilities to another, such as a prosecutor.

Yet, in the instant case, at the plea tender hearing the trial judge failed to address the Appellant at all, electing to remain silent himself and let the "record" (such as it was) be built by the assistant district attorney. Upon challenge, the Superior Court of Pennsylvania ruled that this is permissible under Rule 319, Rules of Criminal Procedure. *Commonwealth v. Kay*, *supra*, at ___, 478 A.2d 1366,1368. What seems to be lacking in this Pennsylvania statute is the word "personally." Nowhere within the statute (rule) is mention made that the judge must "personally conduct" a colloquy of the pleading defendant.

Nor does Rule 320 seem to meet Constit-

utional muster anymore than Rile 319 does. Although the Rule affords the trial judge "discretion" to "permit or direct" that a guilty plea be withdrawn, it fails to properly set a standard for the exercise of this discretion. In this sense, the Rule seems to violate this Court's mandate set forth as early as *Panama Refining Co. v. Ryan*, 293 U.S. 338,340 (1935), that legislative delegation may be unlawful where the time, occasion, and necessity of the delegation have in the end been left todiscretion of the delegate. It has been long-established that, to be lawful, legislative delegation must set forth the parameters of the discretion being vested. See *Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935). For the same reasons, Rule 321 seems to be lacking, in that the trial judge alone is empowered to decide whether to convene a court *en banc* to hear and determine a chal-

lenge to a guilty plea, or hear and determine that challenge himself.

In the instant case, Appellant was the victim of an abuse of judicial discretion which abuse the Pennsylvania judiciary upheld simply because of the statutory language recited within the Pennsylvania Criminal Procedure Rules. This case itself is very much akin to *Henderson v. Morgan*, 426 U.S. 637 (1976), where this Court vacated a guilty plea purportedly tendered by the defendant who had not been instructed in the meaning of the required *mens rea*. Nor had Appellant been so instructed before he entered his plea, as he so testified when, *prior* to sentencing, he sought withdrawal of that plea. Indeed, if Pennsylvania's Wiretapping and Electronic Surveillance Control Act is unconstitutional, as the Appellant has contended, then Appennant

never should have been brought into court at all, and this case thereupon should be given summary disposition, as this Court afforded to the defendants in *Blackledge v. Perry*, 417 U.S. 21 (1974) and *Menna v. New York*, 423 U.S. 61 (1975). A sequelae of improper events occurred as the Appellant at bar became the target of an abusively unconstitutional search and seizure. The search and seizure should have been foreclosed rather than inspired by state law, but it was not. Moreover, once inside a court of law, Appellant's wrongs should have been redressed promptly, but because of faulty Pennsylvania statutes this did not happen. The questions of law raised herein go to the root of the judicial process and are very substantial.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction and the

appeal should be granted.

Respectfully submitted,

DAVID ARTHUR JONES

APPENDIX A

18 Pa.C.S. Chapter 57

WIRETAPPING AND ELECTRONIC SURVEILLANCE

Sec.

5701. Short title of chapter.

5702. Definitions.

5703. Interception, disclosure or use of wire or oral communications.

5704. Exceptions to prohibition on interception and disclosure of communications.

...

Expiration

Section 3 of Act of 1978, Oct. 4, P.L. 831, No. 164, provides that said Act shall take effect in 60 days and that this chapter shall expire five years thereafter.

...

§ 5701. Short title of chapter.

This chapter shall be known and may be cited as the "Wiretapping and Electronic Surveillance Control Act."

...

§ 5702. Definitions.

As used in this chapter, the following words and phrases shall have the meanings given to them in this section unless the context clearly indicates otherwise.

"Aggrieved person." A person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

...

"Contents." As used with respect to any wire or oral communication, is any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication.

...

"Investigating or law enforcement officer." Any officer of the United States or of the Commonwealth or political subdivision thereof, who is empowered by law to con-

duct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offense. The term shall include, but not be limited to, employees of the Pennsylvania Crime Commission, authorized to investigate crimes enumerated in section 5708 (relating to order authorizing interception of wire or oral communications.

...

"Person." Any employee, or agent, of the United States or any state or political subdivision thereof, and any individual, partnership, association, joint stock company, trust or corporation.

"Wire communications." Any communication made in whole or in part through the use of facilities for the transmission of communication by wire, cable or other like connection between the point of origin

and the point of reception furnished or operated by a telephone, telegraph or radio company for hire as a communication common carrier.

...

§ 5703. Interception, disclosure or use of wire or oral communications

Except as otherwise provided in this chapter, a person is guilty of a felony of the third degree if he:

(1) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire or oral communication.

(2) willfully discloses or endeavors to disclose to any other person the contents of any wire or oral communication, or evidence derived therefrom, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication; or

(3) willfully uses or endeavors to use

the contents of any wire or oral communications, or evidence derived therefrom, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication.

...

§ 5704. Exceptions to prohibition on interception and disclosure of communications

It shall not be unlawful under this chapter for:

...

(2) Any investigative or law enforcement officer or any person acting at the direction or request of an investigative or law enforcement officer to intercept a wire or oral communication involving suspected criminal activities where:

(i) such officer or person is a party to the communication; or

(ii) one of the parties to the

communication has given prior consent to such interception. However, no interception under this paragraph shall be made unless the Attorney General or a deputy attorney general designated in writing by the Attorney General, or the district attorney, or an assistant district attorney designated in writing by the district attorney, of the county wherein the interception is to be made, has reviewed the facts and is satisfied that the consent is voluntary and has given prior approval for the interception; however such interception shall be subject to the recording and record keeping requirements of section 5714(a) ... and that the Attorney General, deputy attorney general, district attorney or assistant district attorney authorizing the interception shall be the custodian of recorded evidence obtained therefrom.

...

18 [now 42] Pa.C.S. Rules 319-321

PENNSYLVANIA RULES OF CRIMINAL PROCEDURE

RULE 319. PLEA AND PLEA AGREEMENTS.

(a) GENERALLY. Pleas shall be taken in open court.

(b) PLEA AGREEMENTS.

(1) The trial judge shall not participate in the plea negotiations preceding an agreement.

(2) When counsel for both sides have arrived at a plea agreement they shall state on the record in open court, in the presence of the defendant, the terms of the agreement. Thereupon the judge shall conduct an inquiry of the defendant on the record to determine whether he understands and concurs in agreement.

(3) If the judge is satisfied that the plea is understandingly and voluntarily tendered, he may accept the plea. If thereafter the judge decides not to concur in the plea agreement, he shall permit the defendant to withdraw his plea.

...

RULE 320. WITHDRAWAL OF PLEA OF GUILTY.

At any time before sentence, the court may in its discretion, permit or direct a plea of guilty to be withdrawn and a plea

of not guilty to be substituted.

RULE 321. CHALLENGE TO GUILTY PLEA.

(a) A motion challenging the validity of a guilty plea, or the denial of a motion to withdraw a guilty plea shall be in writing and shall be filed with the trial court within ten (10) days after imposition of sentence. ...

(b) The motion shall be disposed of promptly.

(c) The trial court may schedule a hearing on the motion and shall determine whether the motion shall be argued before one judge alone or before a panel of judges sitting as a court *en banc*. Whenever a single judge hears the motion alone, the judge may make any ruling that could be made by a court *en banc*.

The Constitutional Amendments involved are printed in Appendix D, *infra*.

APPENDIX B

Opinion, *Commonwealth v. Kay*, 478 A.2d 1366 (Pa.Super. 1984)

COMMONWEALTH of Pennsylvania

v.

Roger J. KAY, D.O., Appellant.

No. 538 Pittsburgh, 1983

David Jones, Pittsburgh, for appellant.

Shad Connelly, Asst. Dist. Atty., Erie, for Commonwealth, appellee.

Before ROWLEY, JOHNSON and POPOVICH, JJ.

JOHNSON, Judge:

Appellant Roger Kay, an osteopathic physician, was charged with solicitation to commit murder[1] and criminal conspiracy[2] based upon his role in an attempt to have murdered another local physician at the hospital where the appellant was employed. Appellant had arranged with another

---

[1] 18 Pa.C.S. § 902.

[2] *Id.* § 903.

associate at the hospital for a Tony Magliano to carry out the "contract killing". On October 30, 1981, the date of appellant's arrest, he was informed that Tony Magliano was in reality an FBI undercover agent, who was later identified as agent Wayne Manis. A number of personal contacts and phone conversations between the appellant and "Tony Magliano" were the subject of electronic surveillance and had been recorded.

The matter was initially scheduled for trial in March of 1982 in the Erie County Court of Common Pleas, but it was continued at the request of appellant's trial counsel. Before the trial was rescheduled, the appellant entered a guilty plea to the solicitation charge on May 3, 1982. Sentencing was postponed throughout 1982, and the initial sentencing judge recused himself on February 25, 1983.

Appellant's trial counsel withdrew from the case at appellant's request. Appellant's present counsel filed a petition to withdraw the guilty plea on March 18, 1983, three days prior to the scheduled sentencing hearing. At the hearing on March 21, 1983, the trial court judge denied appellant's motion to withdraw his guilty plea and sentenced the appellant to a four to ten year term of imprisonment. Appellant's counsel then filed on March 30, 1983 a post-sentence motion to withdraw the guilty plea and a motion to modify sentence. These motions were denied by the trial judge on March 31, 1983. The present appeal follows the denial of appellant's motions to withdraw the guilty plea and to reduce the sentence.

The appellant presents four arguments for our review. First, he contends the trial court erred in not allowing him to

withdraw his guilty plea prior to sentencing because he did not enter it knowingly and intelligently and because there is inadequate record evidence to indicate he did. A presentence motion to withdraw a guilty plea will be liberally allowed if the appellant demonstrates "fair and just" reason for the withdrawal, unless the prosecution has suffered substantial prejudice by its reliance on the guilty plea. *Commonwealth* v. *Forbes*, 450 Pa. 185, 299 A.2d 268 (1973); *Commonwealth* v. *Campbell*, 309 Pa. Super. 214, 455 A.2d 126 (1983).

What plea to enter must be a decision by the accused which is voluntarily and intelligently made. *Commonwealth* v. *Forbes*, *supra*. Pa.R.Crim.P. 319 outlines a procedure to be followed that will assure the guilty plea is voluntarily tendered. No more than the inquiries outlined in Pa.R. Crim.P. 319 is required. *Commonwealth* v.

Anthony, ___ Pa. ___, 475 A.2d 1303 (1984).

Our review of the guilty plea proceedings that occurred on May 3, 1982 convinces us that the record completely refutes appellant's allegations. This proceeding more than adequately met the requirements of Pa.R.Crim.P. 319. All that preceded the entry of appellant's plea fully apprised him of the nature of the charges and the rights available to him. Nothing in the record indicates the appellant entered his guilty plea unknowingly or involuntarily.

The appellant contends the record is inadequate because the prosecutor and not the trial judge questioned the appellant. Both Pa.R.Crim.P. 319 and the case law clearly state that the examination of the pleading party need not be performed by the court alone. Either counsel may conduct part or all of the examination.

The essential element is recording that the pleading party is aware of the ramifications of his pleading posture; the law permits counsel to take part in this documentation. See *Commonwealth v. Ingram*, 455 Pa. 198, 316 A.2d 77 (1974). Therefore, appellant's attack on the record's adequacy is without merit.

Relatedly, appellant's second claim is the trial court should have allowed him to withdraw his guilty plea because he was not fully apprised of all the defenses he may have asserted. This court has recognized that an assertion of innocence constitutes a fair and just reason for permitting the withdrawal of a guilty plea. *Commonwealth v. Whittall*, 304 Pa.Super. 258, 450 A.2d 669 (1982). However, as the trial judge recognized in refusing appellant's guilty plea withdrawal, the appellant has never, not even implicitly, asserted his innocence. (N. T. March 21, 1983 at 129.) The contention that he now

has a possible defense does not amount to an assertion of innocence, and, thus, appellant offers no "fair and just" reason why he should be allowed to withdraw his guilty plea. *Commonwealth v. Dorian*, 314 Pa. Super. 244, 460 A.2d 1121 (1983).[3]

Third, appellant claims his guilty plea was not voluntary due to the ineffectiveness of trial counsel. "It is well settled that '[w]hen confronted with a claim of

---

3 Appellant's trial counsel testified at the guilty plea withdrawal hearing that he did discuss with the appellant the merits of any defense. Because appellant's claim does not present an acceptable basis on which to withdraw his guilty plea, the trial court did not have to resolve this credibility question.

Furthermore, since appellant has not met the initial "fair and just" criteria of *Forbes*, we do not have to determine whether the Commonwealth has been substantially prejudiced by its reliance on the guilty plea. However, we do note there is uncontested testimony in the record that the Commonwealth would have substantial administrative and logistic problems, based upon its reliance on the guilty plea, if it were now required to present its case. (N.T. March 21, 1983 at 114-119.)

ineffective assistance of counsel, we must first ascertain whether the issue underlying the issue of ineffectiveness is of arguable merit, and if so, it must be determined whether the course chosen by counsel had some reasonable basis to effectuate his client's interests.'" *Commonwealth v. Lewis*, 314 Pa.Super. 298, ___, 460 A.2d 1149,1151 (1983) (citations omitted). See also *Commonwealth v. Evans*, 489 Pa. 85, 413 A.2d 1025 (1980).

Appellant claims trial counsel was ineffective for failing to suppress electronically recorded testimony between himself and undercover agent Manis. This purported failing on trial counsel's part allegedly duped the appellant into pleading guilty. Trial counsel testified that one of the reasons he did not attempt to suppress this information was based upon his knowledge that the relevant Pennsylvania statute permits an undercover agent to lawfully record conversations to which

he is a party. (N.T. March 21, 1983 at 96).

The Pennsylvania Wiretapping and Electronic Surveillance Control Act provides in 18 Pa.C.S. § 5704(2)(i):

> Exceptions to prohibitions on interception and disclosure of communications
>
> It shall not be unlawful under this chapter for:
>
> ...
>
> (2) Any investigative officer or any person acting at the direction or request of an investigative or law enforcement officer to intercept a wire or oral communication involving suspected criminal activities where:
>
> (i) such officer or person is a party to the communications;

Therefore, trial counsel's decision that a suppression motion would not be successful has a clear basis in the law.

Consequently, since appellant's claim has no merit, the trial attorney's posture on this issue was not ineffective counsel.

Fourth, appellant claims the trial court abused its discretion by refusing to permit the appellant during sentencing the opportunity to call witnesses to testify on his own behalf and by imposing a prison sentence upon impermissible considerations. Regarding the first aspect of this claim, the defense counsel at the beginning of the March 21, 1983 hearing expressly stated he was prepared to proceed with sentencing at the conclusion of the trial court's consideration of appellant's motion to withdraw the guilty plea. At no time during the sentencing proceedings did appellant's counsel indicate he was unprepared, due to the unavailability of witnesses or otherwise, to continue. Therefore, we find this contention to be meritless.

> "The imposition of sentence is a matter vested in the sound discretion of the sentencing judge, whose determination will not be disturbed on appeal absent a manifest abuse of discretion.... If the sentence is within statutory limits there is no abuse of discretion unless the sentence is so manifestly excessive as to inflict too severe a punishment."

Commonwealth v. Russell, 313 Pa.Super 534, 460 A.2d 313 (1983) (citations omitted).

Upon reviewing the sentencing record, it is clear appellant's claim that the sentence was based upon impermissible considerations is totally without merit. Nothing in the record indicates the trial judge sentenced the appellant to an excessive sentence based upon impermissible

considerations.

For the foregoing reasons, the trial court's March 21, 1983 judgment of sentence and the March 31, 1983 orders denying withdrawal of the guilty plea and denying the reduction of sentence is affirmed.

SUPERIOR COURT OF PENNSYLVANIA
PITTSBURGH DISTRICT

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	No. 538
	:	PITTSBURGH,
ROGER J. KAY, D.O.,	:	1983
Appellant.	:	

ORDER

AND NOW, this 20th day of July, 1984, it is ordered as follows:

Judgment of Sentence Affirmed.

BY THE COURT

s/ Irma T. Gardner
Deputy Prothonotary

SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA	:	No. 270 Western District Allocatur Docket, 1984
v.	:	
ROGER J. KAY, D.O.,	:	
Appellant.	:	

November 20, 1984

ORDER OF COURT

"November 19, 1984
Petition Denied
Per Curiam"

s/ Carl Rice

Carl Rice, Esq.
[Prothonotary]

APPENDIX C

Notice of Appeal

IN THE SUPREME COURT OF PENNSYLVANIA
Western District

COMMONWEALTH OF PENNSYLVANIA, Appellee,	:	No. 270 Alloca- tur
v.	:	Docket,
ROGER J. KAY, D.O., Appellant.	:	1984

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that Roger J. Kay, D.O., the Appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Pennsylvania denying review of the judgment of conviction and sentence, entered herein on November 20, 1984.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Appellant was convicted of the crime of criminal solicitation to commit murder, in violation of 18 Pa.C.S. § 902, and was sentenced to pay the costs of his prosecution and to prison confinement for a period of between four and ten years. He is presently confined at the State Correctional Institute, Rockview.

II. The clerk will please prepare a transcript of the record in this case, for transmission to the clerk of the Supreme Court of the United States, and include in said transcript the following:

A. The accusatory instrument(s).

B. Transcript of the Plea Tender Hearing of May 3, 1982 before the Honorable Jess S. Jiuliante, Jr., Judge of the Court Of Common Pleas of Erie County, Pennsylvania.

C. Appellant's presentence Motion to Withdraw Guilty Plea, dated March 18, 1983.

D. Transcript of the Plea Withdrawal and Sentencing Proceedings of March 21, 1983 before the Honorable James B. Dwyer, President Judge of the Court of Common Pleas of Erie County, Pennsylvania.

E. Appellant's Post - Sentence Motions to Withdraw Guilty Plea and to Reduce or Modify Sentence, dated March 30, 1983.

F. Appellant's Notice of Appeal to the Superior Court of Pennsylvania, dated April 7, 1983.

G. Brief of Appellant in the Superior Court of Pennsylvania at No. 538 Pittsburgh, 1983.

H. The Judgment, Opinion and Order of the Superior Court of Pennsylvania at No. 538 Pittsburgh, 1983, entered on July 20, 1984, affirming Appellant's conviction and sentence.

I. Appellant's Petition for Allowance of Appeal to the Supreme Court of Pennsylvania at No. 270 W.D. Allocatur Docket, 1984.

J. The Order of the Supreme Court of Pennsylvania at No. 270 W.D. Allocatur Docket, 1984, entered on November 20, 1984 denying review of Appellant's conviction and sentence.

K. Appellant's Notice of Appeal to the Supreme Court of the United States.

III. The following questions are presented by this appeal:

1. Whether Rule 319, Pennsylvania Rules of Criminal Procedure, as interpreted by the Pennsylvania courts, violates the Sixth Amendment to the United States Constitution, made obligatory upon the states via the Fourteenth Amendment, by permitting a trial judge before whom a defendant contemplates pleading guilty to

a criminal charge to delegate the entirety of his colloquy and notification responsibilities to a prosecutor, and thereby maintain judicial silence throughout the duration of a plea tender hearing, as in the case sub judice?

2. Whether Rule 320, Pennsylvania Rules of Criminal Procedure, as interpreted by the Pennsylvania courts, violates the First, Fifth and/or Sixth Amendments to the United States Constitution, made obligatory upon the states via the Fourteenth Amendment, by affording to a trial judge unfettered discretion to deny a defendant's presentence motion to withdraw a guilty plea to a criminal charge, where the defendant has testified under oath that he tendered the plea unintelligently and involuntarily, notwithstanding the defendant's failure to assert his innocence, as in the case sub judice?

3. Whether Rule 321, Pennsylvania Rules of Criminal Procedure, as interpreted by the Pennsylvania courts, violates the Due Process Clause and/or the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, by vesting in a trial judge unfettered discretion of deciding whether to sit alone or to convene a court en banc to hear a challenge to a guilty plea, as in the case sub judice?

4. Whether the Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa.C.S. § 5704 et seq., as interpreted by the Pennsylvania courts, violates the First, Fourth, Fifth and/or Sixth Amendments to the United States Constitution, made obligatory upon the states via the Fourteenth Amendment; and/or whether the same state statute is in conflict with the Wire Interception and Interception of Oral Communications

provisions of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510, et seq., as amended, in that the Pennsylvania statute in question permits "any investigative or law enforcement officer or any person ... to intercept a wire or oral communication involving suspected criminal activities [without a warrant or judicial or executive authorization] where ... (i) such officer or person is a party to the communication", particularly where the interception was occasioned by Federal law officers, as in the case sub judice?

5. Whether, on the "totality of the circumstances", Appellant's recanted guilty plea violates his rights under the First, Fourth, Fifth and/or Sixth Amendments to the United States Constitution, made obligatory upon the states via the Fourteenth Amendment, in that the Appellant's guilty plea tender was

made unknowingly, unintelligently, and/or involuntarily and/or in that it was unsupported by record adequacy?

Respectfully submitted,

s/ David A. Jones
DAVID A. JONES, ESQUIRE

APPENDIX D

Amendments to United States Constitution

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affrimation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a

capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury ...; nor shall any person ... be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law ... .

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, ... and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

AMENDMENT XIV

Section 1. ... No State shall make or en-

force any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The statutory provisions involved are printed in Appeldix A, *supra*.

84-1441

Office - Supreme Court, U.S.
FILED
MAR 20 1985
ALEXANDER L. STEVAS,
CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1984

ROGER J. KAY, D.O.
Appellant

v.

THE COMMONWEALTH OF PENNSYLVANIA
Appellee

MOTION TO DISMISS/AFFIRM

Michael J. Veshecco, Member
of the Bar of the United
States Supreme Court

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25 pp

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM , 1984

No.

ROGER J. KAY, D.O.

Appellant

v.

THE COMMONWEALTH OF PENNSYLVANIA

Appellee

MOTION TO DISMISS/AFFIRM

STATEMENT OF THE CASE

Appellant, Roger Kay, an osteopathic physician, has challenged his sentence arising from his guilty plea to a charge of Criminal Solicitation to Commit Murder in the Court of Common Pleas of Erie County, Pennsylvania. Kay was sentenced to serve a term of four to ten years in a state institution by Erie County President Judge James B. Dwyer following

lengthy pre-sentencing court proceedings.

The record reveals that Kay was the subject of extensive Federal electronic surveillance by the FBI which was investigating his alleged role as the Pennsylvania dispenser of stolen x-ray film and equipment from several southern states. This surveillance placed Kay in a conspiracy involving the interstate transportation of stolen property with Federal charges lodged against Kay in Mobile, Alabama.

Up until October of 1981, Kay was employed as chief radiologist at an Erie hospital. During the month of October, 1981, Kay had allegedly solicited the "contract killing" of another physician at the hospital. Kay was arrested by Federal agents on October 30, 1981 and gave a full confession revealing his role in the conspiracy and solicitation. His confession was not challenged in the lower court. It was incorporated into the record as hearing Exhibit No. 5 in the plea withdrawal hearing before Judge Dwyer on March 21, 1983.

Both FBI surveillance and Kay's own confession following arrest revealed the essence of the criminal solicitation charge against him. The record reveals that FBI agents confronted Kay with the fact that they were aware of his role in securing a "contract killing" arrangement with one "Tony Magliano" for the death of Dr. Daniel Carneval. Kay was also advised that he had been the subject of electronic surveillance and that "Magliano," with whom he had been dealing in person and by phone, was in reality an undercover agent, Wayne Manis.

Kay admitted that he and another associate at the hospital had made arrangements to have Carneval killed. Kay also admitted arranging Magliano's arrival in the City of Erie on October 20, 1981, at which time Kay drove him to Carneval's residence where pictures of the home were taken. Kay also admitted leading Magliano to the hospital and pointing out Dr. Carneval's office as well as h s parking place. Kay admitted meeting with Magliano at the hospital on the following day and paying him $2,000 in cash,

purportedly as an advance on travel expenses for the contract amount. Kay admitted that the additional $8,000 in cash was to be paid after the killing was completed. Finally, Kay admitted that he pointed out Dr. Carneval to Magliano in the doctor's lounge at the hospital.

As previously related, several of the personal contacts and phone conversations between Kay and "Magliano" (Agent Manis) were the subject of electronic surveillance and interception. The last phone conversation between the parties, intercepted by the FBI, was an attempt by Kay to move up the date of the killing in order to save the job of his associate at the hospital.

Following his arrest on the federal charges from Alabama, Erie County authorities charged Kay with Conspiracy and Solicitation to Commit Murder, the subject of the instant appeal.

The federal surveillance was not challenged in either federal or state court. Kay entered a plea of guilty to the federal charges and was sentenced on

August 16, 1982 to serve a term of six years in a federal penitentiary.

Following a preliminary hearing on the state charges, Kay's case was first listed for trial in Erie County Court in March of 1982. The matter was continued at that time by Kay's counsel, Leonard G. Ambrose, III, Esq., citing the need for additional preparation time. The case was next scheduled for trial during the May, 1982 Term of Criminal Court but Kay entered a guilty plea to the Solicitation charge on May 3, 1982 before the Honorable Jess S. Jiuliante. Sentencing was deferred until September 3, 1982 so that the federal sentence could be first imposed.

Since Kay has subsequently challenged the voluntariness of this guilty plea, the "record adequacy" of the plea is of critical importance. Pursuant to authorized Pennsylvania procedure (See Pa.R.Crim.P. 319, 42 Pa.C.S.A.), Assistant District Attorney Frank Scutella questioned Kay as to his awareness of his "rights."

The relevant portions of the plea colloquy which

purport to elicit Kay's understanding of the charges and the factual basis for the plea include the following:

> "MR. SCUTELLA: Your Honor, this is the case of the Commonwealth versus Roger Kay. At No. 1800 of 1981, Mr. Kay is charged with Criminal Solicitation to Commit Murder and Criminal Conspiracy to Commit Murder. Your Honor, by virtue of Section 906 of the Pennsylvania Crimes Code, Roger Kay cannot be prosecuted on both charges, and we are proceeding on the Criminal Solicitation which is Count One.
>
> Do you understand what you are charged with?
>
> MR. KAY: Yes.
>
> MR. SCUTELLA: Do you, also, understand that by pleading guilty, you are admitting to having committed all the acts complained of which constitute the crime of Criminal Solicitation to Commit Murder?
>
> MR. KAY: Yes.
>
> MR. SCUTELLA: Do you understand you have the right to a trial by jury if you plead not guilty?
>
> MR. KAY: Yes.
>
> ...
>
> MR. SCUTELLA: Mr. Kay, you are charged that on October 9th through the 28th, in 1981, that with the intent of promoting or facilitating the commission of the crime of murder, you did command, encourage, or request another person to engage in specific conduct which would constitute that crime or an attempt to commit

that crime or which would establish your complicity in its commission or attempted commission in that you did engage Agent Wayne F. Manis, Special Agent, Federal Bureau of Investigation to kill Dr. Daniel C. Carneval on October 31, 1981, for the sum of $10,000; thereby, you committed the crime of Criminal Solicitation. Do you understand the factual situation here?

MR. KAY: Yes.

MR. SCUTELLA: Can you explain to the Court exactly what happened?

MR. AMBROSE: Your Honor, if the Court please, the defendant agrees that the factual basis for the plea is as Mr. Scutella stated.

MR. SCUTELLA: Is that correct?

MR. KAY: Yes.

MR. SCUTELLA: Do you understand the definition of criminal solicitation?

MR. KAY: Yes.

MR. SCUTELLA: Any questions?

MR. KAY: No.

MR. SCUTELLA: You hired an agent of the FBI to commit the crime of murder?

MR. KAY: Yes.

MR. SCUTELLA: And in fact you gave that agent $2,000 to do that?

MR. KAY: Yes.

(Hearing Exhibit 6; N.T. 2,3,4,5,6)
(Emphasis Added).

Other portions of the plea colloquy in question, not here repeated, gave Kay the opportunity to ask any question of the Assistant District Attorney, his own attorney or the Court. Mr. Kay asked no questions. N.T. 6, 7.

In addition, following the established practice in Erie County, Pennsylvania, Kay also signed a statement entitled " Defendant's Statement of Understanding of Rights," which also addressed his rights in the plea proceeding. See plea withdrawal hearing Exhibit 2.

On the scheduled sentencing date, September 3, 1982, the parties met with Judge Jiuliante and it was agreed that the sentencing would be continued for 120 days so that the psychological tests completed for the federal pre-sentence investigation report could be supplied to Judge Jiuliante and so that a substantial amount of local, pre-sentencing publicity could subside. Kay was sentenced to a 6 year term in August as previously specified.

Attorney Ambrose filed a sentencing memorandum requesting that the Erie County sentence be imposed concurrently with the federal term or involve consecutive probation. A motion seeking recusal of Judge Jiuliante was also filed.

In subsequent court testimony, Judge Jiuliante admitted that his likely sentence was discussed in Chambers between the parties on September 3, 1982, and that he had declared his posture to be "to the effect that it would not be concurrent..." Plea Withdrawal Hearing, N.T. 100-101.

While the recusal petition remained pending before Judge Jiuliante, the sentence in the case was tentatively scheduled for February 25, 1983. Kay had surrendered himself to federal authorities and had commenced his sentence at Milan, Michigan. The attorney-client relationship apparently began to deteriorate when Kay chose to ignore Attorney Ambrose's advice by refusing to sign rendition papers for his return to Erie County Court for the February 25th sentencing. Attorney Ambrose, in later court testimony following

his withdrawal from the case, admitted that he had communicated Judge Jiuliante's sentencing posture to Kay and that "Dr. Kay would not call and would not answer any correspondence we sent to him..." N.T. 90.

On the date scheduled for sentencing, Attorney Ambrose appeared on behalf of the defendant though Kay himself had chosen not to return to Erie County and was not present. When the Commonwealth asserted that it had learned that Kay was apparently making arrangements for other counsel to represent him, Attorney Ambrose indicated that he had not been so informed and chose to proceed on the petition to recuse Judge Jiuliante. See Record of Petition to Recuse Sentencing Judge, February 25, 1983, N.T. 5.

Erie County President Judge James B. Dwyer heard arguments from counsel and ruled that the "appearance of impropriety" would be removed by Judge Jiuliante's recusal from the case. Sentencing was then scheduled before Judge Dwyer for March 21, 1983 and the Commonwealth was directed to force Kay's return and to notify two attorneys in Pittsburgh (present appellate

counsel) to be present for the sentencing.

Three days prior to the sentencing, on March 18, 1983, Kay's present counsel filed an appearance on his behalf as well as a Petition to Withdraw the Guilty Plea; also filed were omnibus pre-trial motions asking for a change of venue/venire, suppression of evidence, etc.

Judge Dwyer heard lengthy testimony on March 21, 1983 as to the withdrawal of the guilty plea (see Record of pre-sentence motion to withdraw guilty plea, N.T. 1-130). The request to withdraw the plea was denied since Kay had cited no fair and just reason and since the Commonwealth would face substantial prejudice if the plea were withdrawn.

Testimony at the hearing included that of Kay, his former attorney, Judge Giuliante, and the prosecuting attorney. Kay was thereafter sentenced to serve a term of four to ten years to run consecutive to the federal sentence. Post-sentencing motions were denied and appeals within the Pennsylvania system were then perfected.

Following the submission of briefs and oral argument, the Pennsylvania Superior Court denied relief in an Opinion issued July 20, 1984. As to the validity of the plea, the Court's review of the plea record "...convinces us that the record completely refutes Appellant's allegations." Pennsylvania Superior Court Opinion, p. 3. Other claims for relief were likewise summarily denied.

Significantly, no federal challenge to Pa.R.Crim.P. 319 or 320 was made in either motion to withdraw the guilty plea or in subsequent appeals to the Pennsylvania Superior and Pennsylvania Supreme Courts.

The Pennsylvania Supreme Court denied further review in a per curiam order issued November 20, 1984. Appellant now proceeds on direct appeal to the United States Supreme Court, setting forth five grounds for relief, all of which are raised now for the first time.

COUNT ONE: MOTION TO DISMISS : The instant appeal does not present a substantial federal question:

While Petitioner attempts to invoke 28 U.S.C. 1257 (2), he has stated that he "...drew into question the

validity of certain Pennsylvania statutes on the ground that they are repugnant to the constitution or laws of the United States, and the state court decision is in favor of their validity." Jurisdictional Statement, p. 2.

In point of fact, neither Pa.R.Crim.P. 319 nor the factual colloquy conducted in the instant case present any significant federal question.

Pa.R.Crim.P. 319 (a), in relevant part, provides that a judge shall not accept a guilty plea "...unless he determines after inquiry of the defendant that the plea is voluntarily and understandingly tendered. Such inquiry shall appear on the record..." Simply stated, this rule purports to follow the mandate of Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed2d 274 (1969), and its progeny.

The rule, in its Comment, mandates inquiry into six specific areas and permits the judge to delegate the actual examination of the defendant to either defense counsel or the attorney for the Commonwealth.

Pa.R.Crim.P. 320 and 321 regulate withdrawal of guilty pleas in Pennsylvania and follow a settled body of law. Pennsylvania caselaw in fact requires a "fair and just reason" for the withdrawal request when the Commonwealth has not been substantially prejudiced. See, inter alia, Com. v. Forbes, 450 Pa. 185, 299 A.2d 268 (1973); Com. v. Anthony, ___Pa.___, 475 A.2d 1303 (1984); U.S. v. Crowley, 529 F.2d 1066 (3rd Cir. 1976), Cert.Den., 425 U.S. 95, 96 S.Ct. 2209, 48 L.Ed2d 820 (1976).

Given the factual findings made by the trial judge and affirmed by both of Pennsylvania's Appellate Courts, no significant federal question is in fact presented. The plea colloquy in question and Kay's real notice of the true nature of the charge as contained therein meets full compliance with Henderson v. Morgan, 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed2d 108 (1976), and Com. v. Ingram, 455 Pa. 198, 316 A.2d 77 (1974).

Since the lack of a substantial federal question is a matter of record, the Commonwealth respectfully submits that the instant appeal should therefore be

dismissed. Duncan v. Tennessee, 405 U. S. 127, 92 S.Ct. 785, 31 L.Ed2d 86 (1972); Moon v. Maryland, 398 U.S. 319, 90 S.Ct. 1730, 26 L.Ed2d 262 (1970).

COUNT TWO: MOTION TO DISMISS: Questions presented here have not been timely or properly raised in the trial court or in Pennsylvania's appellate courts and have therefore not been expressly passed on.

Despite Petitioner's present allegations, close review of both Petitions to Withdraw Guilty Plea as well as the appeal to the Pennsylvania Superior Court and the Petition for Allowance of Appeal to the Pennsylvania Supreme Court will establish that any federal constitutional challenge to Pa.R.Crim.P. 319, 320 and 321 has never been made in the instant case.

As Your Court held in Webb v. Webb, 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed2d 392 (1981), "It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system (citations omitted)." 451 U.S. 493 at 497-498.

This rationale is most persuasive and should be dispositive of the appeal in this case. The sum total of Kay's posture throughout this matter has alleged an "involuntary" plea of guilty, an implicit assertion of innocence to permit withdrawal of the plea and the ineffectiveness of trial counsel. No challenge to any of the Pennsylvania Rules has ever been made until the filing of the Jurisdictional Statement with Your Court.

While Appellee has no question that the Pennsylvania Rules would pass constitutional muster, neither the Pennsylavnia Superior Court nor the Pennsylvania Supreme Court has had the opportunity to examine these arguments. It is therefore respectfully submitted that the instant appeal should be dismissed.

COUNT THREE: MOTION TO DISMISS: The judgment of the trial court as affirmed by both the Pennsylvania Superior and Supreme Courts rests on an adequate non-federal basis.

The trial court, after hearing testimony from Kay, his former attorney, the plea judge and the prosecuting attorney, denied Kay's last-minute request to withdraw his guilty plea in the following manner:

"Well, the Court is fully aware that the presentence withdrawal request must be liberally construed but I'm also aware the defendant must present a fair and just reason for withdrawing the plea and in this case, I honestly don't see a fair and just reason. And the reason I say that is, considering the actual words in the colloquy given on May 3rd, 1982, it seems to me those questions are very clear, from the testimony of the doctor himself today, as well as from the pre-sentence report there is no question. From the psychiatrists' and psychologists' reports there is no question Dr. Kay is an intelligent person, much more so than the average defendant in a criminal case as Judge Jiuliante says. There is no doubt in my mind he understood everything that went on. I feel he does not have a fair or just reason for withdrawing the plea and in addition to this, I don't think there is any doubt there would be serious consequences to any delay in the trial of this case in that the Commonwealth could be very prejudiced.

You have got the problem of the victim and his family, their feelings which we have to consider, the fact that some of these witnesses may or may not be available, the fact that it happened seventeen months ago and it would be another six months or a year and as time passes, memories diminish. And another thing that impresses me greatly is the fact we have not had an inference or a statement that this defendant is not guilty. He's not denied anything here at all.

So, for those reasons, I'm going to refuse to withdraw the guilty plea as rendered on May 3rd, 1982." Record of Presentence Motion to Withdraw Guilty Plea, N.T. 128,129 (Emphasis Added).

In review of these findings, the Pennsylvania Superior Court Opinion noted that only four arguments were presented for review. The trial court's findings were specifically affirmed with the appellate court noting that "...the record completely refutes Appellant's allegations," and that the proceeding "more than adequately met the requirements of Pa.R.Crim.P. 319." Pennsylvania Superior Court Opinion, p. 3.

The Superior Court also noted that "Nothing in the record indicates the Appellant entered his guilty plea unknowingly or involuntarily." Ibid. These factual findings can be affirmal thereof indicate that the judgment rests on an adequate non-federal basis as to the validity of the plea in question.

The Superior Court noted that the challenge to the prosecutor's conduct of the colloquy was "without merit," since this procedure was expressly authorized by both Pa.R.Crim.P. 319 and Com. v. Ingram, 455 Pa. 198, 316 A.2d 77 (1974). Id. at pp. 3,4.

The Superior Court also noted that Kay "... has never, not even implicitly, asserted his innocence," concluding that "no fair and just reason why he should be allowed to withdraw his guilty plea" was made. Ibid. These conclusions, as a matter of record, amount to a simple affirmation of the trial court's factual findings, a matter totally outside the scope of federal jurisdiction.

In addressing the third claim for review, that of ineffective assistance, the Superior Court noted that trial counsel's decision that a suppression motion would not be successful had "a clear basis in law." Id. at p.6. Moreover, Your Court's most recent pronouncement in Strickland v. Washington, 466 U.S. , 104 S.Ct. 2052, 80 L.Ed2d 674 (1984), does little to help petitioner's cause. There, a record showing would require that circumstances dictate "an attorney's performance fell below an objective standard of reasonableness and so prejudiced the defendant as to result in the denial of a fair trial. This degree of prejudice requires a demonstration

of the existence of a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

Here, the testimony of the attorney in question (plea withdrawal hearing, N.T. 68-97) included his opinion as to the likely success of any suppression motion and the assessment that "It would be totally without merit." N.T. 96. This opinion was expressly affirmed by the Pennsylvania Superior Court and indeed has an adequate basis in law.

Finally, the fourth issue raised on appeal addressed the sentencing procedures and the rationale of the lower court for imposing a consecutive jail sentence. The Pennsylvania Superior Court noted that this argument was "...totally without merit." Pennsylvania Superior Court Opinion, p. 7. Again, review of this Opinion indicates the clear lack of any federally-based challenge and clear basis for judgment outside the scope of federal review. It is therefore respectfully suggested that the instant appeal should be dismissed.

COUNT FOUR: MOTION TO AFFIRM: It is manifest that the questions here presented for review are so unsubstantial as not to need further argument.

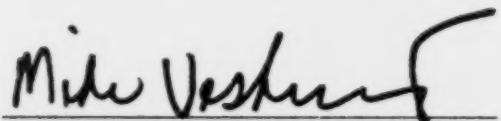
The lack of merit of the issues now presented is best viewed in noting that the Pennsylvania Supreme Court denied review in a simple per curiam order denying the Petition for Allowance of Appeal. That decision notes no need for a brief on the merits of these issues or on any further oral argument. This type of review is of course a matter of sound judicial discretion and notes that an appeal will be allowed "only when there are special and important reasons therefore." Pa.R.A.P. 1114.

The Commonwealth respectfully asserts the obvious by noting that the Pennsylvania Supreme Court has acted summarily and that no better comment as to the merits of these issues need be made.

WHEREFORE, the Commonwealth of Pennsylvania, Appellee in the instant matter, respectfully submits that the appeal in the instant case should be dismissed since it does not present a substantial federal

question; that the questions now sought to be reviewed were not timely or properly raised below and have therefore not been expressly passed on; and that the judgment rests on an adequate non-federal basis; in the alternative, the Commonwealth respectfully asserts that the judgments of the Pennsylvania Superior Court and Pennsylvania Supreme Court should be affirmed since the questions presented are so unsubstantial as not to need further argument.

Respectfully submitted,



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No. 84-1441

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

ROGER J. KAY, D.O.,

Appellant,

v.

THE COMMONWEALTH OF PENNSYLVANIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

APPELLANT'S REPLY BRIEF

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IN THE

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No. 84-1441

ROGER J. KAY, D.O.,

Appellant,

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THE COMMONWEALTH OF PENNSYLVANIA,

Appellee.

REPLY BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM AND TO DISMISS

I. APPELLEE'S MOTION TO DISMISS SHOULD BE DENIED BECAUSE THE QUESTIONS PRESENTED HAVE BEEN TIMELY AND PROPERLY RAISED IN THE COURTS BELOW.

Without question, this Court possesses jurisdiction on appeal usually where the

questions presented have been timely and properly raised in the courts below. See 28 U.S.C. § 1257(b); S.Ct.R. 16(b); *Webb v. Webb*, 451 U.S. 493 (1981). The test is whether "the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. 451 U.S. 493,497-498. It was in this case, as the record shows.

Appellant first objected to evidence obtained via eavesdropping and wiretapping at the Probable Cause Hearing held on December 14, 1981, his first day in court on the charges in question. J.S. at 6. Then, despite the tender of a guilty plea on or about May 3, 1982, Appellant moved *before* sentencing on or about March 18, 1985 for withdrawal of that guilty plea on grounds that "Neither a knowing, understanding (intelligent), and voluntary guilty plea, nor a factual basis for the same, is supported by 'Record Adequacy.'" See Brief

for Appellant at 3-4, 6-7, 478 A.2d 1366 (Pa.Super. 1984). Argument II before the Superior Court of Pennsylvania relied completely upon *Boykin v. Alabama*, 395 U.S. 238 (1969) and *McCarthy v. United States*, 394 U.S. 459 (1969). Brief for Appellant at 13-22, 478 A.2d 1366 (Pa.Super. 1984). Argument IV before the Superior Court relied substantially upon *Brady v. United States*, 397 U.S. 742 (1970) and several lower Federal court decisions: *United States v. Cantor*, 469 F.2d 435 (3rd Cir. 1972) and *United States v. DeCavalcante*, 449 F.2d 139 (3rd Cir. 1971). Brief of Appellant at 28-32, 478 A.2d 1366 (Pa.Super. 1984). Thus, clearly Appellant challenged Pennsylvania's guilty plea tender procedures under *Federal* law.

What is most important, as this Court has expressed, is that "the state court understood that the federal Constitution was the basis for the objection...." *Saltonstall v. Saltonstall*, 276 U.S. 260,267-268

(1928).

As further evidence that Appellant's arguments were timely and properly raised before the Superior Court of Pennsylvania, that court itself recited Appellant's arguments within its reference to facts presented:

> The appellant presents four arguments for our review. First, he contends the trial court erred in not allowing him to withdraw his guilty plea prior to sentencing because he did not enter it knowingly and intelligently and because there is inadequate record evidence to indicate he did. *Commonwealth v. Kay*, ___ Pa.Super. ___, 478 A.2d 1366,1368 (1984).

Thus, the Superior Court did address these Federal questions. Then, the Pennsylvania Superior Court resolved the dilemma:

> What plea to enter must be a decision by the accused which is voluntarily and intelligently made. ... Pa.R.Crim.P. 319 outlines a procedure to be followed that will assure the guilty plea is voluntarily tendered. No more than the inquiries outlined in Pa.R.Crim.P. 319 is required. *Id.*

Therefore, *sub silentio*, the Superior Court

upheld Appellant's challenge to Rule 319 under the *Brady*, *Boykin*, and *McCarthy* decisions of this Court upon which Appellant had relied in his Superior Court brief.

The Superior Court went even further by rationalizing:

> All that preceded the entry of appellant's plea fully apprised him of the nature of the charges and the rights available to him. Nothing in the record indicates the appellant entered his guilty plea unknowingly or involuntarily. *Id.*

Needless to say, the Superior Court thus raised the salient question herein: Was Appellant fully apprised of the charges and of his rights? He denies that he was.

But it is less what things "in the record" indicate than what may be absent from the record, which is paramount. As this Court noted a generation ago:

> Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered [information or a right] but in-

> telligently and understandingly waived it. Anything less is not waiver. *Carnley v. Cochran*, 369 U.S. 506,516 (1962).

And that is precisely what the Pennsylvania courts did: they presumed "waiver" because "nothing in the record indicate[d] otherwise; and they justified this practice on Pa.R.Crim.P. 319 notwithstanding that Appellant had challenged this logic under Federal law expressly in his brief.

The Superior Court of Pennsylvania never once mentioned *Brady*, *Boykin*, *McCarthy*, or any other Federal law or decision with its opinion affirming Appellant's conviction. Yet, this Court has reasoned that a lower court need not do so as a condition-precedent to conferring appellate jurisdiction upon this Court:

> Of course the decision must be against the claim ..., but it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63,67(1928).

It is worthy of note that this Court recently cited *Bryant v. Zimmerman* in *Webb v. Webb.*, *supra*, at 497. The Appellee has relied on *Webb* in support of its Motion to Dismiss this appeal because Federal questions contained herein were untimely or improperly raised. Appellee's Brief at 15.

The same Federal issues were preserved before the Supreme Court of Pennsylvania, where Appellant, within his Petition for Allowance of Appeal restated each Federal argument he had advanced before the Superior Court of Pennsylvania, including arguments under *Boykin*, *Brady*, *McCarthy*, and other Federal decisions. Brief of Petitioner at 10-11, 16-17, 20, ___ Pa. __, ___ A.2d ___ (1984). The Supreme Court refused without opinion to consider Appellant's case.

This Court has adopted the posture that "[w]here is appears from the opinion of a state court ... that a state statute

was drawn into question, as repugnant to the Constitution, and that the decision of the court was in favor of its validity, we have jurisdiction on appeal. *For we need not inquire how and when the question of the validity of the statute was raised* when such question appears to have been actually considered and decided [below]. *Charlestown Federal Savings and Loan Ass'n. v. Alderson*, 324 U.S. 182, 185-186 (1945). (Emphasis added).

That the Federal questions had been presented before the Superior Court, and *without* objection by Appellee at that time as being untimely or improper, is evident from Appellee's having addressed on the merits Appellant's state of mind when the guilty plea was tendered:

> Kay testified at his plea withdrawal hearing that he had been "very nervous" at the time of his plea; that "I was instructed to sign the document"; that "I don't remember reading it myself" (the plea rights sheet); that he "answered all the questions in a very harried fashion, without regard to pleading guilty,

> he "didn't make a decision, (he) acted in blind faith"; and didn't remember he was "fully conscious of what was said because my mind was someplace else." Brief of Appellee at 11, 478 A.2d 1366 (1984) citing N.T. 66,68, 70-71, 74.

Even if, for whatever reason, it may be concluded that Appellant raised issues under the Federal Constitution and/or law in an untimely fashion, this Court has reaffirmed recently its power to review any *plain error* even if unchallenged by the Appellant in the state courts, where deemed necessary to prevent *fundamental unfairness*. *Wood v. Georgia*, 450 U.S. 261,265,n,5 (1981); *accord, Vachon v. New Hampshire*, 414 U.S. 478 (1974). *Wood* was cited favorably in *Webb v. Webb, supra*, at ___, 101 S.Ct. 1889,1894. (Concurring opinion of Powell, J.). *Webb* has been relied upon by the Appellee.

At the very least, this Court should postpone final consideration of the question of jurisdiction until a hearing can be held on the merits of Appellant's case, as

this Court has done previously under similar circumstances. See *Cramp v. Board of Public Instruction*, 366 U.S. 934 (1960). Or instead, the Court might dismiss the appeal but grant *certiorari*, particularly in view of the *fundamental fairness* issues Appellant has raised. See *Knapp v. Schweitzer*, 355 U.S. 804 (1957). In any event, for this Court simply to dismiss the appeal or for it to affirm the conviction would be unfair.

II. APPELLEE'S MOTION TO DISMISS SHOULD BE DENIED BECAUSE THE QUESTIONS TO BE REVIEWED ARE SUBSTANTIAL FEDERAL QUESTIONS.

III. APPELLEE'S MOTION TO AFFIRM SHOULD BE DENIED BECAUSE THE QUESTIONS TO BE REVIEWED ARE NOT MANIFESTLY UNSUBSTANTIAL.

In order for this Court to affirm the

lower court judgment, pursuant to Rule 16. 1(c) of this Court's Rules, this Court has to be convinced that the Appeal manifestly presents questions that are so unsubstantial as not to need further argument. Such is hardly the situation in the instant case, and certainly not for the reasons proffered by the Appellee, whose argument has not proceeded beyond the fact that the Supreme Court of Pennsylvania denied judicial review. Motion to Affirm at 21.

Nor is Pa.R.A.P. 1114 illuminating to this Court, as the Appellee has contended. Rule 1114 is a state rule of procedure and, consequently, not of concern to this Court. That Rule 1114 permits *state* judicial review "only when there are special and important reasons therefore" does not control and should not be equated with provisions of this Court's Rule 16.1(c). A question might be "substantial" but not "special" or "important" under Pennsylvania's Rule 1114.

Far from being unsubstantial, the Appellant's questions would appear to be exceptionally substantial, or so this Court has agreed on many previous occasions. As to the plea tender questions, their significance has been expounded masterfully by this Court in *Boykin*, *Brady*, *Carnley*, and *McCarthy*, *supra*, *inter alia*. Clearly the issues passed upon by this Court in those cases were not mooted as being unsubstantial under *Duncan v. Tennessee*, 405 U.S. 127 (1972) or *Moon v. Maryland*, 398 U.S. 319 (1970) or earlier cases from which *Duncan* and *Moon* were derived.

Nor does *Strickland v. Washington*, 466 U.S. ___, 104 S.Ct. 2052 (1984) appear to render unsubstantial the question of the effectiveness of Appellant's trial counsel, as Appellee seems to contend in its Brief at 19. Some time ago, this Court noticed in *McMann v. Richardson*, 397 U.S. 759 (1970) that a defendant's guilty plea must be one

"based on reasonably competent [legal] advice to be intelligent and valid. *Id.* at 770. *Strickland* would not appear to change that standard materially. For one reason, the defendant in *Strickland* tendered his plea over objections of his counsel, while the Appellant followed counsel's advice. Secondly, the Court found that the error complained of in *Strickland* could not have affected the judgment of conviction at all, which cannot be true of Appellant's case. Finally, but most saliently, this Court found that the sentencing proceeding that *Strickland* stemmed from was not fundamentally unfair, whereas Appellant's would seem to be fundamentally unfair *on the totality of the circumstances*. For instance, nowhere in the record of Appellant's case could Appellee have introduced evidence more harmful than the evidence already admitted. Nor are "overwhelming aggravating circumstances" apparent in Appellant's case such as

they appear in *Strickland*. 466 U.S. ___ at ___; 80 L.Ed.2d 674 at 701.

This Court reasoned in *Strickland* that one test measuring the significance of ineffective counsel is whether, but for the ineffectiveness, a different outcome would be a reasonable probability; and it explained that a "reasonable probability" is a probability sufficient to undermine confidence in the outcome." *Id.* at ___; 80 L.Ed.2d 674 at 698. This would appear to square with the *fundamental fairness* test referenced by this Court in *Wood v. Georgia*, *supra*. If so, Appellant would seem to have a "reasonable probability" of acquittal at trial should he be permitted to withdraw the guilty plea and suppress fruits of unlawful electronic surveillance which this Appellant's trial counsel failed even to attempt to suppress, relying upon an erroneous interpretation of *United States v. White*, 401 U.S. 745 (1971). See Brief of Appellee

at 22, 478 A.2d 1366 (1984).

Indeed, the Superior Court of Pennsylvania considered Appellant's challenge to The Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa. C.S. § 5704(2)(i), and ruled that Appellant's attorney's "decision that a suppression motion would not be successful has a clear basis in the law" because it is "not ... unlawful ... for ...[a]ny investigative or law enforcement officer or any person acting at the direction or request of an investigative or law enforcement officer to intercept a wire or oral communication involving suspected criminal activities [as long as] such officer or person is a party to the communication." *Commonwealth v. Kay*, *supra*, at ___; 478 A.2d 1366 at 1368. Thus, the Superior Court having considered this issue, Appellant's challenge to this Pennsylvania statute is properly before this Court under *Charlestown Federal Savings & Loan*

Assoc. v. Alderson, supra, at 185-186. Nor is the question of the constitutionality of Pennsylvania's Eavesdropping / Wiretapping statute unsubstantial, inasmuch as without clear guidance from this Court, defense counsel such as Appellant's trial counsel will predictably continue to avoid a challenge to such statutorily-approved warrantless searches and seizures, relying, as Appellee has done, upon the views expressed or implied by the Pennsylvania courts:

> The lack of merit of the issue is best viewed in noting that the Pennsylvania Supreme Court denied review in a simple per curiam order... . Brief of Appellee at 21.

If the Supreme Court of Pennsylvania has the last word on whether a statute is repugnant to the Constitution, then this Court will have failed to meet the imperative duty conferred upon it by Article III of the United States Constitution, for it should be apparent that none of the quest-

ions Appellant has raised via this appeal can properly rest on an adequate state or non-federal basis, nor has the Appellee offered any authority supporting this contention.

CONCLUSION

This Court should deny the Appellee's Motions to Affirm and Dismiss, or, at the very least, it should postpone final consideration of the jurisdictional question until the hearing on the merits. Alternatively, this Court might grant *certiorari* and review one or more of the questions, because these questions involve *fundamental fairness*.

Respectfully submitted,

DAVID ARTHUR JONES